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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ALEX McDONALD

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a  
foreign business corporation,

Defendant.

CASE NO. 3:17-cv-01157-YY

**PLAINTIFFS RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS  
UNDER FRCP 12(b)(6)**

Plaintiff responds to Defendants' Motion to Dismiss. This response is supported by the

Declarations of Alex McDonald, Tom McDonald and Edward P. Fitch.

**MOTION NO. 1**

In reviewing the motion to dismiss under F.R.C.P. 12(b)(6) the court assumes the truth of all well pled allegations and draws all favorable inferences in favor of the non-moving party.

*Ileto v. Glock Inc.*, 349 F3d 1191, 1199–1200 (9th Cir 2003). Plaintiff's complaint does not

allege that beavers themselves were responsible for flooding to Plaintiffs property. Instead, the complaint alleges that Defendant failed to remove a beaver dam that was built under the railroad trestle owned and operated by the defendant.

Defendant's reliance on *Fields v. Wilson* is misguided as it relates to private property rights not tort liability. In *Fields* the plaintiffs, who had private property rights to trap beavers, sought injunctive relief that would stop the State of Oregon Game Commission from allowing third parties to trap beavers on or around navigable waters throughout Oregon. *Fields v. Wilson*, 186 Or. 491, 493 (1949). The Supreme Court denied injunctive relief holding, in part, that beavers are animals' *ferae naturae* and as such, they cannot be captured by anyone without express or implied permission from the state. *Fields* does not address how the doctrine of *ferae naturae* is addressed with regards to premises liability.

*Union Pacific Railroad Company v. Nami* does address the application of *ferae naturae* to premises liability. Therein, a railroad employee brought an action against his employer after he contracted West Nile Virus and encephalitis after a mosquito bit him while he was working on the railroad company's property. 498 S.W. 890, 891 (Texas 2016). Applying *ferae naturae* the Court held that the employer was not liable, reasoning that landowners are not liable under the *ferae naturae* doctrine because landowners are not able to predict and control the actions of wild animals. *Id.* at 898. In contrast to the holding in *Nami*, Oregon statutes and regulations show that beavers are in fact in the control of individual landowners. For example, ORS 610.105 provides the authority for private landowners to remove beavers from their land without permission from the Oregon Department of Fish and Wildlife.

Unlike *Nami*, the animals at issue here, beavers, were not the primary cause of the damage. Instead, the cause of the damage was a dam, constructed of logs, sticks and like materials.

The dam itself, which is the primary cause of the damage on plaintiff's property, was subject to removal since it is on private land. (See Fitch Declaration and accompanying exhibits concerning beaver or dam removal on private property). This is evident as defendant had control over this area and did, in fact, remove the dam during the spring of 2017. (See McDonald Declarations) Defendant's motion to dismiss Defendant's first motion to dismiss under the doctrine of *ferae naturae* should be denied.

## MOTION NO. 2

Plaintiff concedes defendant's motion number 2, and seeks allowance by the court to re-plead a state law claim concerning the failure of Union Pacific to keep the creek within the right of way free of obstruction. Such claim would not be preempted by the Federal Regulations. *Miller v. SE Pennsylvania Transportation Authority*, 628 P. 78, 103 A. 3<sup>rd</sup>, 1225, (Pa. 2014); *MD Marr Associates, LLC v. CSX Transportation, Inc.*, 1715 F. 3<sup>rd</sup> 479 (3<sup>rd</sup> Cir, 2013, as amended May 30, 2013).

Dated this 13<sup>th</sup> day of September, 2017.

FITCH LAW GROUP, PC

BY:

  
EDWARD P. FITCH, OSB #782026  
Attorney for Plaintiff

## **CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing *Plaintiff's Response to Defendant's Motion to Dismiss Under FRCP 12(b)(6) and Declarations of Edward P. Fitch, Alex McDonald and Tom McDonald* on:

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by the following indicated method or methods:

by **mailing** a full, true and correct copy thereof in a sealed first-class postage-prepaid envelope, addressed to the attorney(s) listed above, and deposited in the United States Postal Service at Redmond, Oregon, on the date set forth below.

by **emailing** a full, true and correct copy thereof addressed to the attorney(s) listed above, at the email address listed above, on the date set forth below.

by **hand-delivering** a full, true and correct copy thereof to the attorney(s) listed above on the date set forth below.

by **filing electronically** with the Clerk of the Court through the Court's ECF system, which will send notification of this filing to the above listed recipient.

by **faxing** a full, true and correct copy thereof to the attorney(s) at the fax number(s) shown above, on the date set forth below.

Dated this 13<sup>th</sup> day of September, 2017.

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